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01-794

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

IDAHO STATE TAX COMMISSION,

Petitioner,

v.

GOODMAN OIL COMPANY OF LEWISTON, an Idaho Corporation; and GOODMAN OIL COMPANY, an Idaho Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR A WRIT OF CERTIORARI

ALAN G. LANCE
Attorney General

CARL E. OLSSON*
THEODORE V. SPANGLER, JR.
Deputy Attorneys General
IDAHO STATE TAX COMMISSION
800 Park Blvd. Plaza IV
P.O. Box 36
Boise, ID 83722-0410
(208) 334-7530
* *Counsel of Record*

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QUESTION PRESENTED

Does section 10 of the Hayden-Cartwright Act, 4 U.S.C. § 104, provide Congressional authorization for States to impose their motor fuel taxes on Indian tribes or their members within an Indian reservation?

11/30/01 FRI 17:11 FAX 402 342 5440 COCKLE PRINTING 005

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Statutory Provision Involved	1
Statement of The Case	2
I. Federal Statutory Background	2
II. Factual And Procedural Background	5
Reasons For Granting The Writ	7
I. The Authority Of A State To Tax Reservation Motor Fuel Sales In The Same Manner As It Taxes Such Sales Elsewhere Is An Important And Recurring Issue That Should Be Resolved Now, Particularly As Two State Supreme Courts Are Split On The Issue	7
II. The Idaho Supreme Court Erred In Concluding That The State Does Not Have Authority To Impose Its Motor Fuel Tax Upon The Reservation Sale Of Motor Fuel To Tribes And Enrolled Members Of Tribes.	12
Conclusion	15

11/30/01 FRI 17:11 FAX 402 342 5440 COCKLE PRINTING 006

TABLE OF AUTHORITIES

Page

CASES

Department of Taxation and Finance of New York v Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) 7, 8

Herzog Brothers Trucking, Inc. v. State Tax Commission, 533 N.E.2d 255 (Ct. Ap. N.Y. 1988) 10

Lorillard v. Pons, 434 U.S. 575 (1978) 13, 14

Matter of the State Motor Fuel Tax Liability of A.G.E Corporation, 273 N.W.2d 737 (1978).....10, 11

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 8, 10

Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991) 9

Standard Oil Co. v. California, 291 U.S. 242 (1934) ...3, 4

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) 9

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 10

Union Pacific R.R. Co. v. Riggs, 66 Idaho 677, 166 P.2d 926 (1946) 3

STATUTES

28 U.S.C. § 1257 1

Hayden-Cartwright Act, 4 U.S.C. § 104..... *passim*

68 Stat. 641, 644 5

70 Stat. 799 5

11/30/01 FRI 17:11 FAX 402 342 5440 COCKLE PRINTING 007 008

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

57 Interior Dec. 129 at 139 (1940) 5

57 Interior Dec. 129 at 140 14

AMERICA'S HIGHWAYS 1776-1976: A HISTORY OF THE FEDERAL AID PROGRAM (U.S. Government Printing Office 1976) 2, 3

CONSTITUTIONAL PROVISIONS

Idaho Const. Art. VII, § 17 6

CODE SECTIONS

Idaho Code § 63-2412 (Michie 2000) 6

Idaho Code § 40-701 (Michie 2001) 6

Idaho Code § 63-2405 (Michie 2000) 5

11/30/01 FRI 17:12 FAX 402 342 5440 COCKLE PRINTING

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Idaho, on behalf of the Idaho State Tax Commission, petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Idaho in this case.

OPINIONS BELOW

The opinion of the Idaho Supreme Court (App. at 1) is reported at 28 P.3d 996. The opinion of the state district court (App. at 21) is unreported. The administrative decision of the Idaho State Tax Commission (App. at 42) is unreported.

JURISDICTION

The Idaho Supreme Court entered its denial of the Idaho State Tax Commission's petition for rehearing on July 27, 2001. (App. at 60) The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

Section 10 of the Hayden-Cartwright Act, 4 U.S.C. § 104, provides in pertinent part:

> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same

11/30/01 FRI 17:12 FAX 402 342 5440 COCKLE PRINTING 009

extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

STATEMENT OF THE CASE

This case presents a recurring conflict in State/Tribal sovereignty that has not been, but should be, resolved by this Court. Specifically, it concerns whether Congress gave consent for states to impose non-discriminatory taxes upon reservation sales of motor vehicle fuels to Indian tribes and tribal members. The case will affect sale of motor vehicle fuels on Indian reservations throughout the Nation.

I. Federal Statutory Background

The first quarter of the twentieth century saw explosive growth in the numbers of cars using the nation's relatively undeveloped highways. The initial dependence on property tax revenues to fund highway construction and maintenance proved inadequate. AMERICA'S HIGHWAYS 1776-1976: A HISTORY OF THE FEDERAL AID PROGRAM 41-67 (U.S. Government Printing Office 1976). In 1919, Oregon led the nation in developing a new source of revenue to

11/30/01 FRI 17:12 FAX 402 342 5440 COCKLE PRINTING 010

serve the rapidly growing need. The new source was the motor fuel tax. It quickly gained acceptance across the country. By 1929, fuel taxes garnered state revenues of $430.2 million, or 56% of all revenues from road users. AMERICA'S HIGHWAYS 114. When the Hayden-Cartwright Act was enacted in 1936, Congress was presented with a fairly uniform system of state motor fuel taxes specifically devoted to highway construction and maintenance.

The motor fuel tax functions as a surrogate user fee. This is the policy foundation of the tax. Instead of tollbooths set up on every highway in America, a tax is imposed at the pump and the revenues devoted to the highways. Regardless which element in the distribution chain bears the legal incidence of the tax, the economic burden of the tax is borne by the consumer using the roads in proportion to his use. The Idaho Supreme Court made this point in language that might have come from almost any state court in the country.

> The provisions of the act leave no doubt in our minds that the clear policy of the law is simply to require, so far as the legislature can, that all using motor vehicles on the highways of this state shall contribute to their maintenance in the proportion of that use. This enforced contribution is measured by the amount of gasoline consumed in that use.

Union Pacific R.R. Co. v. Riggs, 66 Idaho 677 at 685, 166 P.2d 926 at 929 (1946). (quoting *Independent School Dist. v. Pfost*, 51 Idaho 240, 4 P.2d 893.)

Two years prior to passage of the Hayden-Cartwright Act, this Court decided *Standard Oil Co. v. California*, 291

11/30/01 FRI 17:12 FAX 402 342 5440 COCKLE PRINTING 011

U.S. 242 (1934). In *Standard Oil*, the Court pointed to the lack of federal legislation permitting collection of state fuel tax on federal reservations and held that motor fuel sold on the Presidio of San Francisco, a federal military reservation, was not subject to California fuel tax. Motorists could purchase fuel on the Presidio and consume it on state maintained public highways. This demonstrated a weakness in the policy foundation of the motor fuel tax. A universal surrogate user fee breaks down when fuel can be purchased in a way that allows the consumer to avoid paying his fair share toward the construction and upkeep of the roads he uses. An economist might call this an example of the "free rider" problem.

The policy weakness inherent in the free rider problem is not confined to fuel sold on one kind of federal reservation and not another. Any consumer who obtains fuel without contributing to the upkeep of the highways he uses is a free rider. Other consumers pay his share. This applies to fuel sold on Indian reservations just as well as fuel sold on military reservations.

Congress recognized this. That is why section 10 of the Hayden-Cartwright Act does not restrict itself to eliminating the free rider problem only for fuel sold on military reservations. It applies to fuel sold on "military and other reservations." To indicate non-military reservations it also intended to reach, Congress provided an extensive list of fuel outlets and classes of sellers one might find on "military and other reservations." The Act, for example, applies to naval reservations because it specifically mentions fuel sold from "ship stores" and "ship service stores." The list of sellers also includes "licensed traders." In the words of the Solicitor of the Department

11/30/01 FRI 17:12 FAX 402 342 5440 COCKLE PRINTING 012

of the Interior, writing four years after the passage of the Act, the phrase "licensed trader" is "particularly suggestive of Indian reservations." 57 Interior Dec. 129 at 139 (1940). The Solicitor opined States may require Tribes and their members to pay motor fuel taxes on Indian reservations. After the Solicitor's opinion issued, Congress twice reenacted the Hayden-Cartwright Act. In 1947, the Act was reenacted without change. 68 Stat. 641, 644. In 1956, the Act was amended only to include Guam. 70 Stat. 799.

II. Factual And Procedural Background

At all times relevant to this case, both respondent corporations were licensed distributors of motor vehicle fuel under Idaho law. Goodman Oil of Lewiston purchased gasoline from an Exxon terminal in Spokane, Washington. A sister company, Sun Transportation, transported the fuel through the state of Washington to an outlet located in Idaho on the Coeur d'Alene Indian Reservation (Reservation). A federally recognized Indian Tribe, the Coeur d'Alene Tribe (Tribe), owned the retail outlet. Situated wholly within Idaho, the Reservation borders Washington on the west. Sun Transportation entered the Reservation directly from Washington. Title to the gasoline transferred from Goodman Oil of Lewiston to the Tribe at the border.

Idaho statutes impose an excise tax on motor fuel. Idaho Code § 63-2405 (Michie 2000). The tax revenue does not go to the state's general fund. Idaho's Constitution and statutes dedicate the fuel tax revenues chiefly for the construction and maintenance of roads and highways in

the state. For this purpose, the revenues are distributed to both the Idaho Transportation Department and local road and highway districts. Idaho Const. Art. VII, § 17. Idaho Code § 63-2412 (Michie 2000). Idaho Code § 40-701 (Michie 2001). Both state and local levels use some of these revenues to construct and maintain highways on the various Indian reservations in Idaho. The record in this case, for example, discloses actual or planned expenditures on road construction for the period 1993-2003 on the Coeur d'Alene Reservation to be $13,814,000. This total does not include local or federal funds. State road maintenance expenditures on the same reservation for the period 1993 through part of 1999 total $6,165,348. The Reservation covers approximately 345,000 acres. The Tribe has about 1,750 enrolled members. Official Coeur d'Alene Tribe Website at *http://www.cdatribe.com/overview.html*.

The case began with the issuance of a tax deficiency notice to Goodman Oil Lewiston. The distributor protested the deficiency notice to the Tax Commission. The Commission, referring to the Hayden-Cartwright Act, issued a decision assessing the tax. The distributor then appealed to state district court. The district court, after reviewing the Hayden-Cartwright Act issue, struck down the tax assessment. By the time the case reached the Idaho Supreme Court, the issues had been reduced to two. The first was a matter of state law. Which element in the distribution chain bore the legal incidence of the tax? The tax commission argued it was the licensed distributor, the licensed distributor argued it was the consumer, the Idaho Supreme Court held it falls on the retailer with the duty to collect and remit the tax falling on the licensed distributor. The second issue was the federal

question. Does the Hayden-Cartwright Act provide states with the necessary Congressional consent to impose motor fuel taxes on sales made to tribes and tribal members on an Indian reservation? If the Act does provide Congressional consent, then it makes no difference who bears the legal incidence of the tax. The Idaho Supreme Court held the Act does not provide Congressional consent for the imposition of motor fuels taxes on sales made on the reservation. Although the case was presented as an appeal from a Motion for Partial Summary Judgment, by deciding the two issues before it as it did the Court fully disposed of the case. This petition results.

REASONS FOR GRANTING THE WRIT

I. The Authority Of A State To Tax Reservation Motor Fuel Sales In The Same Manner As It Taxes Such Sales Elsewhere Is An Important And Recurring Issue That Should Be Resolved Now, Particularly As Two State Supreme Courts Are Split On The Issue.

The question presented is not new, but it grows in importance. It has divided lower courts that have been forced to decide it. It recurs.

The issue recurs because it is important to the states for both policy and practical reasons. The motor fuel tax is a surrogate user fee. To the extent that some users escape paying their fair share, the policy underlying the motor fuel tax is undercut. Furthermore, the very purpose of motor fuel is to permit mobility. Fuel purchased ex-tax on the reservation will be used to travel the highways off the reservation. In *Department of Taxation and*

11/30/01 FRI 17:13 FAX 402 342 5440 COCKLE PRINTING 015

Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994), the Court tied state lack of authority to tax to on-reservation consumption. "Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption, cigarettes to be consumed on the reservation by enrolled members are tax exempt and need not be stamped." *Milhelm Attea*, 512 U.S. at 64 (citations omitted.)

Off-reservation use is taxable, but no state will be able to monitor individual on-reservation as opposed to off-reservation fuel consumption. No general formula is a fair alternative to individual monitoring because individual consumption patterns are so diverse. States will collect the motor fuel taxes to which they are entitled only if they can collect motor fuel taxes on all sales made on the reservation.

In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court suggested if a state is unable to enforce a tax because the legal incidence falls on Indians or Indian tribes, the state is generally free to shift the tax's legal incidence. This is only a partial solution. If the legal incidence is shifted to the consumer, Indians and tribal vehicles will still be able to travel roads, both on and off the reservation, built and maintained with state motor fuel tax revenues to which they have not contributed. If the incidence of the tax is shifted to the distributor, Tribes will simply become distributors. When, as in this case, the reservation abuts another state, the tribal distributor is free to move the fuel directly from a state beyond the jurisdiction of the taxing state to a reservation that, but for the Hayden-Cartwright Act, is likewise

11/30/01 FRI 17:14 FAX 402 342 5440 COCKLE PRINTING 016

beyond the state's authority to tax. Even when reservation boundaries and state lines are not co-extensive, normal collection procedures are curtailed regardless where the legal incidence of the tax falls. *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991), teaches tribal sovereign immunity will bar suits filed by States to collect taxes owed for sales to non-Indians. States may be forced to seize goods in transit to reservations, a far more confrontational collection technique used by the state of Washington in *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980). There will be disputes as to whether the state has the authority to audit on the reservation. If the state does have audit authority, there will be disputes over how much authority the state has.

The issue is also important to tribes. If tribes and individual Indians do not contribute to the construction and maintenance of the roads they use, some states and local governments may simply choose to devote more resources to off-reservation roads than they do now. Tribes may even find that local highway districts amend their boundaries to exclude those portions of the districts now falling inside reservations. Either scenario would mean a diminution in the funds available for roads on the reservation.

The Hayden-Cartwright Act issue is important not only to states and tribes, but to non-Indian retailers facing competition from Indian retailers. If Indians can market a fuel tax exemption, non-Indian retailers are at their mercy. The profit margin on each gallon of fuel sold is small; the state tax burden on each gallon is comparatively high. Non-Indian retailers not driven out of business will see

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sources of funding evaporate as lenders become wary of loaning money to businesses confronting such competitive disadvantage. Given that there are more than 275 Indian land areas in the United States administered as Indian reservations, this is no small problem. Bureau of Indian Affairs Answers to Frequently Asked Questions at *http://www.doi.gov/bia/aitoday/q and a.html.*

Examples of the recurring nature of the question include cases decided by this Court. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court decided the case without having to discuss "whether the Hayden-Cartwright Act applies to Indian reservations at all." *White Mountain Apache*, 448 U.S. at 151, n.16. In *Chickasaw Nation*, 515 U.S. 450, the Court declined to address the issue because it was not presented to the courts below and not fairly included in the question tendered for the Court's review. This case presents the Hayden-Cartwright Act question to the Court for a third time.

In state courts, too, the issue recurs. The Hayden-Cartwright Act issue was presented to the Court of Appeals of New York in *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 533 N.E.2d 255 (Ct. Ap. N.Y. 1988), *on remand from State Tax Commission v. Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988). The issue was raised untimely and not decided by the Court. In addition to this Idaho case, the Supreme Court of South Dakota addressed the issue in *Matter of the State Motor Fuel Tax Liability of A.G.E. Corporation*, 273 N.W.2d 737 (1978). The South Dakota Court's decision is squarely inconsistent with that of the Idaho Supreme Court.

11/30/01 FRI 17:14 FAX 402 342 5440 COCKLE PRINTING 018

A.G.E. arose when a non-tribal contractor constructed roads within two South Dakota Indian reservations under federal contracts and the State sought to impose a use tax for diesel fuel used in the construction. The contractor disputed the tax, contending for several reasons that the State lacked jurisdiction to tax fuel used on Indian reservations. In analyzing the contractor's arguments, the Court determined that the Hayden-Cartwright Act pertained both to sale and use of motor vehicle fuel and then held the Act granted to the states the right to tax use or sale of motor vehicle fuel sold to tribes and individual Indians on Indian reservations.

> We are of the opinion that the United States has granted to the states the right to exercise limited jurisdiction in taxing the use or sale of gasoline or other motor vehicle fuel within federal areas in exactly the same manner as if those areas did not exist, except in cases where the gasoline is to be used exclusively by the United States. Jurisdiction was extended to the states by Section 10 of the Hayden-Cartwright Act . . . and in Section 1 of the Buck Act.

Matter of State Motor Fuel Tax Liability of A.G.E. Corp., 273 N.W.2d 737 at 739. (citations omitted.)

Once the Court determined South Dakota had jurisdiction to tax the on-reservation sale of motor vehicle fuel to Indians, it faced the second question. Did the federal preemption doctrine apply despite the Hayden-Cartwright Act? The Court determined that it did not. The Court's federal preemption discussion is superfluous without the initial determination that the Act permits

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states to tax the on-reservation sale and use of motor vehicle fuel to and by Indians.

II. The Idaho Supreme Court Erred In Concluding That The State Does Not Have Authority To Impose Its Motor Fuel Tax Upon The Reservation Sale Of Motor Fuel To Tribes And Enrolled Members Of Tribes.

The State Tax Commission presented two arguments for the proposition that states have Congressional consent to impose their motor fuel taxes on sales made on an Indian reservation to tribes or members of tribes. The first argument is based on the language of the statute. The Commission analyzed the phrase "licensed trader" and concluded the Solicitor of the Department of the Interior understated the case when he concluded "licensed trader" is only "particularly suggestive of Indian reservations." The phrase is an exceptionally strong indication Congress intended States to have the power to collect motor fuel taxes from Indians on Indian reservations. In federal statutes, federal case law and the Code of Federal Regulations, the phrase "licensed trader" is almost always used to mean one licensed to trade with Indians. In the few instances in which "licensed trader" is used in a non-Indian context, it does not refer to anyone engaged in the sale of motor fuel. When "licensed trader" is used in a statute dealing with the sale of motor fuel, the phrase can refer only to a licensed Indian trader. Despite this, the Idaho Supreme Court held against the State. It reasoned that, although Congress may have meant to reach Indian traders, it did not make its intent "unmistakably clear." (App at 9.)

11/30/01 FRI 17:15 FAX 402 342 5440 COCKLE PRINTING

The Commission also relied on a rule of statutory construction. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *Lorillard v. Pons,* 434 U.S. 575 (1978). The Commission pointed principally to the opinion of the Solicitor of the Department of the Interior when it argued that there existed an administrative interpretation supporting the Commission's view of the Hayden-Cartwright Act. The re-enactment of the statute after issuance of the Solicitor's opinion therefore indicated with unmistakable clarity Congress's agreement with the view expressed in the opinion that sales of motor fuels to Indians on a reservation were subject to state motor fuel tax.

The Solicitor's opinion arose out of the following situation. The Menominee Indian Mills were sawmills located on the Menominee Indian Reservation in Wisconsin. They were operated by the United States. Expenses were borne by the Tribe and all proceeds of the mill operations were for the benefit of the Tribe. Gasoline was sold through the commissary. The Solicitor determined that for both state and federal gasoline tax purposes, the mills should be treated as a government agency.

Wisconsin levied an excise tax on gasoline sold, used and distributed in the state, with the exception of gasoline sold to the United States or its agencies. The tax was enforced through a system of licenses on wholesalers who were responsible for the payment of the tax to the state. As to whether the Wisconsin gasoline tax could be enforced against sales of fuel made to Tribal members, the Solicitor determined that the Hayden-Cartwright Act

11/30/01 FRI 17:15 FAX 402 342 5440 COCKLE PRINTING 021 022

was dispositive. The Solicitor noted that in the absence of the Act, the state tax would not apply. Given the Act, however, purchases of fuel by Indians were subject to state fuel tax. The Solicitor was clear.

> While I am of the opinion, therefore, that the act of June 16, 1936, [the Hayden-Cartwright Act] subjects to the State gasoline tax sales made through the commissary to private persons, there remains the question whether the statute also removes the immunity from such taxes of Indians making purchases on Indian reservations. . . . Although the immunity of purchases from an Indian commissary might be removed by the Federal statute, purchases made by the Indians on the reservation might nevertheless be exempt. However, I think this would not be the proper conclusion . . . .

57 Interior Dec. 129 at 140

Reasoning that the Solicitor's decision was ambiguous, the Idaho Supreme Court never considered the powerful argument flowing from the rule reiterated in *Lorillard*. The Commission respectfully urges that the Solicitor's decision is not ambiguous; application of *Lorillard* alone is enough to reverse the decision of the Idaho Supreme Court.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN G. LANCE
Attorney General

CARL E. OLSSON
Deputy Attorney General

THEODORE V. SPANGLER, JR.
Deputy Attorney General

30/01 FRI 17:15 FAX 402 342 5410 COCKLE PRINTING 023

App. 1

Supreme Court of Idaho,
Boise, February 2001 Term.

GOODMAN OIL COMPANY OF LEWISTON, an Idaho corporation, and Goodman Oil Company, an Idaho corporation, Plaintiffs-Respondents,

v.

IDAHO STATE TAX COMMISSION, Defendant-Appellant.

No. 25994.

June 8, 2001.
Rehearing Denied July 27, 2001.

Alan G. Lance, Attorney General, Boise, for appellant. Carl E. Olsson argued.

Jim Jones and Associates, Boise, for respondents. John C. McCreedy argued.

SCHROEDER, Justice.

This is an appeal from a district court order denying partial summary judgment to the Idaho State Tax Commission (the Commission), based on its ruling that the Commission could not levy fuel tax or transfer fees against Goodman Oil Company of Lewiston (Goodman Oil) on fuel sold to the Coeur d'Alene Indian Tribe (the Tribe).

I.

BACKGROUND AND PRIOR PROCEEDINGS

The period at issue in this case spans from January 1997 through March 1998. Goodman Oil was a licensed distributor of fuel in Idaho as defined by I.C. § 63-2401(13).

Goodman Oil purchased gasoline from an Exxon Terminal in Spokane, Washington. Sun Transportation, a sister corporation of Goodman Oil, transported the gasoline through the state of Washington directly to a location at the eastern border of the state and the western border of the reservation. The gasoline was transported without traveling through any part of Idaho lying outside of the reservation. The Tribe purchased the gasoline at the border of the state of Washington and the reservation. The Tribe paid Sun Transportation to haul the gasoline to the Tribe-owned Benewah Auto Center located on the reservation. Neither the Tribe nor Benewah Auto Center was a licensed distributor of fuel in Idaho.

In 1994 the Tribe and the Commission entered into an agreement that the Tribe would remit fuel tax and transfer fees to the Commission for gasoline sales made at the Benewah Auto Center to non-Indians. The Tribe has remitted payments to the Commission since that time.

Beginning in August of 1997, the Commission issued deficiency notices to Goodman Oil for gasoline sold to the Tribe from January of 1997 through March of 1998. The Commission alleged that because Goodman Oil was the owner of the fuel in Washington and the owner as it arrived in Idaho, Goodman Oil was the first receiver of the fuel and responsible for remitting the fuel tax and transfer fee. The deficiencies alleged by the Commission totaled $40,814. Goodman Oil filed timely protest to each determination. The Commission issued a final decision on May 4, 1998, and assessed Goodman Oil for existing deficiencies in the amount of $27,453, reversed the assessment of penalties and granted Goodman Oil a credit for fuel tax paid by the Tribe on the sale of fuel to non-

Indians. On June 18, 1998, Goodman Oil filed its complaint in this matter with the district court. The parties filed cross-motions for summary judgment.

The district court held that the Commission could not impose the tax on Goodman Oil. The district court determined that although Goodman Oil brought the fuel into Idaho for the purposes of the Fuel Tax Act, no federal act authorized the state to tax fuel sales made on Indian reservations, and the incidence of the tax was on the consumer and therefore interfered with the Tribe's ability to exercise its sovereign functions.

II.

STANDARD OF REVIEW

"When this Court reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion." *Family Trust v. Christensen*, 133 Idaho 866, 870, 993 P.2d 1197, 1201 (1999). A party should be granted summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c).

"Constitutional issues and the construction and application of legislative acts are pure questions of law over which this Court exercises free review." *Struhs v. Protection Technologies, Inc.*, 133 Idaho 715, 718, 992 P.2d 164, 167 (1999), *citing Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 905-906, 980 P.2d 566, 569-70 (1999). "When

questions of law are presented, this Court is not bound by findings of the district court, but is free to draw its own conclusions from the evidence presented." *Mutual of Enumclaw v. Box*, 127 Idaho 851, 852, 908 P.2d 153, 154 (1995).

III.

THE HAYDEN-CARTWRIGHT ACT DOES NOT PROVIDE CONGRESSIONAL AUTHORIZATION FOR A STATE TO IMPOSE A FUEL TAX ON THE SALE OF FUEL TO INDIANS ON INDIAN RESERVATIONS WITHIN THE STATE.

It is a long-standing rule of construction that tax statutes granting the right to tax are strictly construed against the taxing authority and in favor of the taxpayer with any ambiguities to be resolved in favor of the taxpayer. *Reinecke v. Gardner*, 277 U.S. 239, 244, 48 S.Ct. 472, 474, 72 L.Ed. 866, 868 (1928). Furthermore, taxation of Indians cannot be enforced absent clear Congressional authorization. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459, 115 S.Ct. 2214, 2220-2221, 132 L.Ed.2d 400, 409-410 (1995), *citing Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-481, 96 S.Ct. 1634, 1642-1645, 48 L.Ed.2d 96, 107-111 (1976). The United States Supreme Court has consistently stated:

> '[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 [105 S.Ct. 1245, 1258, 84 L.Ed.2d 169, 187] (1985). Two such canons are

> directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, *e.g.*, *Bryan v. Itasca County, supra*, at [426 U.S. 373] 393 [96 S.Ct. 2101, 2113, 48 L.Ed.2d 710, 723-724 (1976)]; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 [93 S.Ct. 1257, 1263, 36 L.Ed.2d 129, 136-137] (1973); *Choate v. Trapp*, 224 U.S. 665, 675 [32 S.Ct. 565, 569, 56 L.Ed. 941, 945-946] (1912).

Montana v. Blackfeet Tribe, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985).

The Hayden-Cartwright Act (the Act) states in relevant part:

> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States.

To summarize, the Act says that states can levy fuel tax on military or other reservations as they can outside of those reservations, on any party other than the United States government. The question in this case is whether the Indian reservation is a "reservation" included within

the Act or whether the use of the term "licensed trader" supports imposition of the tax.

A. Treatment Of The Act In Case Law As Applied To Indian Reservations

The United States Supreme Court has not addressed whether the Act applies to Indian reservations. In *Chickasaw Nation, supra*, the state of Oklahoma argued in briefing that the Act expressly authorized states to levy the motor fuel tax on Indian reservations. However, the Supreme Court declined to address the question because it was not raised in the lower court proceedings. The Court stated that Oklahoma's "newly discovered claim of vintage legislative authorization" was not "fairly included" in the question tendered for the Court's review. *Chickasaw Nation*, 515 U.S. at 457, 115 S.Ct. at 2219, 132 L.Ed.2d at 408. The United States Supreme Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), held that the Act was "not designed to overcome the otherwise pre-emptive effect of federal regulation of tribal timber." *Id.* at 152 n. 16, 100 S.Ct. at 2588 n. 16, 65 L.Ed.2d at 678 n. 16. The Court went on to state "[w]e do not reach the more general question of whether the Hayden-Cartwright Act applies to Indian reservations at all." *Id.*

The Commission points to the South Dakota Supreme Court decision in *Matter of the State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737, 739 (S.D.1978), which held that Congress, through the Act, "granted to the states the right to exercise limited jurisdiction in taxing the use or sale of gasoline or other motor vehicle

fuel" on federal areas. *A.G.E. Corp.*, however, is not on point. *A.G.E. Corp.* dealt with tax levied on a non-Indian contractor doing work for the Bureau of Indian Affairs on tribal land. The Supreme Court of South Dakota, although holding that an Indian reservation was a federal area covered by the Act, found that a tax on the contractor was not an indirect tax on the "Indian tribe, an Indian or an Indian reservation", *Id.* at 741, inferring that if it was, it would not be allowed. Cases cited by the court in *A.G.E. Corp.* for historical background of the Act use the term "federal areas" and deal with a federal dam, airplane assembly plant and military reservation – none refers to the issue of whether Indian reservations are covered by the Act or if the Act authorizes taxation of tribal members. *See State of Minnesota v. Keeley*, 126 F.2d 863, 864 (8th Cir.1942); *Sanders v. Oklahoma Tax Comm'n*, 197 Okla. 285, 169 P.2d 748 (1946).[1]

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[1] *Keeley* questioned whether the Act was intended to have application only to a technical "sales" tax, and not to any other form of state gasoline or motor vehicle fuel tax in federal areas. The Eighth Circuit Court of Appeals held that it applied to all forms of tax. *Sanders* questioned whether fuel stored and used only on federal areas–(not on state highways) was subject to taxation. The Supreme Court of Oklahoma held that the purpose of the Act was to permit the various states to tax the use or sale of gasoline occurring within federal areas in exactly the same manner as though such areas did not exist, except in cases where the gasoline was to be used exclusively by the United States.

B. The Language Of The Act

There are two references within Section 10 of the Act which the Commission argues reveal the fact that it was Congress' intent to allow the levying of fuel tax on Indian reservations. First is the use of the term "licensed trader" and second is the use of the word "reservation."

The Commission claims that the United States Supreme Court defined the term "reservation" to include Indian reservation. *See United States v. Celestine*, 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909). However, put in context, the Court's description of reservation in *Celestine* is not so decisive:

> But the word 'reservation' has a different meaning, for while the body of land described in the section quoted as 'Indian Country' was a reservation, *yet a reservation is not necessarily 'Indian Country.'* The word is used in land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide.

Celestine, 215 U.S. at 285, 30 S.Ct. at 95, 54 L.Ed. at 197 (emphasis added).

An Indian reservation is a reservation of land that Congress has withdrawn from the public domain for a variety of purposes, including Indian autonomy. Though *Celestine* is a land law case nearly a century old, the phrase "a reservation is not necessarily 'Indian Country' " still rings true. Indian reservations are different; distinct from every other type of reservation, i.e., national

parks, wilderness areas, military reservations, and even further, Indian reservations are a distinct entity within the law. The use of the word "reservation" in the statute at issue, alone, does not establish that Congress had the clear and unmistakable intent of waiving tribal immunity to state fuel taxation.

Next, the Commission claims that the term "licensed trader" can only refer to licensed Indian trader. To support this assertion the Commission must prove that there were no other distributors or sellers of goods that are required to be licensed.

The Commission argues that the district court erred in interpreting and applying the federal district court decision in *Falls City Brewing Company v. Reeves*, 40 F.Supp. 35 (D.Ky.1941), to mean that "licensed trader" did not refer to licensed Indian trader. Even if the district court did err in articulating what type of reservation was at issue in that case, the case is informative as to what other kinds of licensed traders there were in 1941. The case mentions licensed seller of malt beverages, a licensed retailer on a government reservation and licensed traders on government reservations generally. The Commission's argument would mean that "licensed trader" can only be applied to those who trade with Indians; however, it is just as probable that the term "licensed trader" could refer to licensed distributors or sellers of goods in *all* federal reservations. Though Congress may have contemplated or intended the term "licensed traders" to include licensed Indian traders, they did not make that intention unmistakably clear in the Act.

The Act itself is made up of ten sections. Four of these sections contain the word "reservation," two of which use the term "reservation" in conjunction with the term "Indian." Section three uses the term "Indian Lands or other federal reservations," section six uses the phrase "Indian reservation roads." The Court can only assume that Congress was deliberate in its use and non-use of words. By not using the term "Indian reservation" or "licensed Indian trader" in the relevant portion of the Act, Congress did not make it clear that it intended to abolish tribal immunity from state motor fuel taxation.

C. Legislative History And Subsequent Executive Interpretation

The Act was originally an amendment to the federal highway appropriations bill. The Commission contends that the text of the bill, as proposed, was modified in committee to include the terms "licensed trader" and "other reservations." As discussed above, these additions are not dispositive.

The Commission maintains that the historical context of the Act supports the notion that states needed money to build and maintain roads on Indian reservations, ergo the states needed to tax fuel on the reservations to pay for it. However, Congress had already passed legislation authorizing appropriation of funds for survey, improvement, construction and maintenance of Indian reservation roads. Pub.L. No. 520, 45 Stat. 750-751 (1928).

The opinions of the Attorney General and Solicitor of the Department of Interior cited by the Commission suggest that the Act is applicable to Indian reservations, but

they are ambiguous. For example, the Attorney General Opinion of 1936, which dealt with the issue of whether national parks fell within the Act, mentions the term "Indian reservation" in passing: "It is true that some of the agencies which are expressly designated in Section 10 *apparently* are such as usually pertain to military, naval, or Indian reservations, and that section does not expressly mention national parks." 38 U.S. Op. Atty Gen. 522 at 524 (emphasis added).

The Opinion of the Solicitor of the Department of Interior is similarly ambiguous. The Solicitor says "[t]he statute clearly subjects the sales made through the Government agencies specified to State gasoline taxes and provides the method by which such taxes shall be collected. It is not clear, however, whether the Government agencies specified are intended to include such a Federal agency as the Menominee tribal enterprise and whether the reference to reservations includes Indian reservations." 57 Interior Dec. 129 at 138 (1940). The Solicitor explains how a brief discussion surrounding the passage of the Act indicated that Congress intended to permit the application of fuel tax in areas where they were previously prohibited, thus it could be inferred that this included Indian reservations, and, the use of the term *licensed trader* was suggestive of an Indian reservation. *Id.* at 139. Later in the same opinion, the Solicitor acknowledges that purchases made by Indians on the reservation might remain exempt. However, because the Act allows states to tax all sales on reservations not previously subjected to such taxes, the Solicitor reasons that because Indians buying fuel inside the reservation have not had to pay the tax, now they do. *Id.* at 140. This interpretation

of the Act is not conclusive. If the Act applies to Indian reservations at all, it is just as plausible that the Act authorizes taxation of sales made to non-Indians within the reservation that were prohibited before the Act.

The Commission makes the argument that because Congress was aware of the opinions of the Attorney General and Solicitor General, and because Congress amended the Act subsequent to those opinions, reenacting the pertinent sections without change, Congress agreed with those opinions. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 869-870, 55 L.Ed.2d 40, 45-46 (1978). However, those opinions do not stand for the proposition that the Act unequivocally applies to state fuel taxation on Indian reservations. In addition, the states waited approximately forty years to mention the Act in cases before the United States Supreme Court to validate the levying of such taxes. *See e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Congress was aware that the Supreme Court was addressing the language of the Act to determine if it expressly authorized state fuel tax on Indian reservations, and failed to clarify its intent to make the point unmistakably clear. *See e.g., Id.; Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995).

Another point that suggests that Congress did not unmistakably intend to abolish tribal immunity from state fuel taxation is that there have been recent attempts to pass legislation to authorize the same tax. *See* H.R. No. 3966, 105th Cong.2d Sess. (1998) and S. 550, 106th Cong. 1st Sess. (1999) (Two proposed bills that would have the

effect of allowing state taxation of fuel sales on Indian reservations within the last two years.).

A final point that weighs strongly against the Commission's position is that the Commission has an arrangement with the Coeur d'Alene tribe for payment of taxes on non-Indian fuel sales and not sales to members of the Tribe. Arguably, if such payment is authorized by the Act such an arrangement would not be necessary.

The language of the Act, the treatment of the Act in case law, the legislative history of the Act and subsequent executive interpretation of the Act must be considered in light of the longstanding rule adhered to by the United States Supreme Court that the Indian exemption from state taxes will only be lifted when Congress has made its intention to do so unmistakably clear. Ambiguous provisions are interpreted to the benefit of the tribes. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989) (In the field of taxation of private parties doing business with Indian tribes, ambiguities in the law are as a rule resolved in favor of tribal independence.); *see also Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998) (Taxation on Indians will not be allowed unless Congress has authorized such taxation and unless it has made its intention to do so unmistakably clear.); *see also Director of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 121 S.Ct. 941, 148 L.Ed.2d 830 (2001) (Legislative history can be used to determine express Congressional intent.). It is not unmistakably clear that Congress intended to eliminate the exemption of the Tribes from the taxes the state attempts to impose.

IV.

THE IDAHO FUEL TAX AND TRANSFER FEE STATUTES, I.C. §§ 63-2401 et seq. and I.C. §§ 41-4901 et seq., IMPOSE THE LEGAL INCIDENCE OF THE FUEL TAX ON THE RETAILER OF THE FUEL.

The Commission claims that the incidence of Idaho's fuel tax is on the distributor, and that the "incidence" inquiry should focus on who pays the tax.

The statute in effect during the period in question was I.C. § 63-405, which stated in relevant part: "[a]n excise tax is hereby imposed on all gasoline . . . received. The tax is to be paid by the licensed distributor and measured by the total gallons of gasoline . . . received by him." The statute in effect prior to July 1, 1997, defined "received" as follows:

> (4) Gasoline . . . imported into this state . . . shall be deemed to be received at the time the fuels arrive in this state and by the person who is the owner of the gasoline . . . when the fuels arrive in this state. Where gasoline . . . brought into this state by a licensed distributor is shipped or delivered directly to a person not a licensed distributor, then the fuels shall be deemed to be received by the licensed distributor importing those fuels into this state.

I.C. § 63-2403.

After July 1, 1997, the statute was modified to read:

> (4)(a) Gasoline . . . imported into this state . . . is received at the time the fuel arrives in this state by the person who is, at the time of the arrival, the owner of the fuel.

> (b) Gasoline . . . imported into this state by a licensed distributor and delivered directly to a person not a licensed distributor is received by the licensed distributor importing the fuel into this state at the time the fuel arrives in this state.
>
> (c) Fuel arrives in this state at the time it crossed the border of this state.

Goodman Oil contends that I.C. § 63-2402 establishes that the incidence of the tax is on the "user" of the fuel, that is, the consumer. That statute states in relevant part:

> (1) A tax is hereby imposed for the privilege of using the public highways upon the use or possession for use of gasoline, and the tax shall be imposed without regard to whether use is on a governmental basis or otherwise.
>
> (2) The tax imposed in this section shall be at the same rate as specified in section 63-2405, Idaho Code, upon each gallon of gasoline used or possessed for use. The tax shall be subject to the deductions and refunds set forth in this chapter.
>
> (3) Any person coming into this state in a motor vehicle may transport in the manufacturer's original tank of that vehicle, for his own use only, not more than (30) gallons of gasoline for the purpose of operating that motor vehicle, without complying with the provisions of this chapter.
>
> (4) This use tax shall be a debt owing from the user to the state of Idaho.

It is settled law that "when Congress does not instruct otherwise, a state's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales

made within Indian Country." *Chickasaw Nation*, 515 U.S. at 453, 115 S.Ct. at 2217, 132 L.Ed.2d at 406. Although the Act does not expressly authorize the imposition of Idaho's fuel tax on the reservation (whether on Indians or non-Indians), this Court must decide if the state's fuel tax levy is nonetheless permitted.

The United States Supreme Court in *Chickasaw Nation* outlined the "categorical approach" to be used in evaluating a state's attempt to tax within Indian country. *See Id.* at 458, 115 S.Ct. at 2220, 132 L.Ed.2d at 409. The analysis begins with the general premise that "[A]bsent cession of jurisdiction or other federal statutes permitting it . . . a State is without power to tax reservation lands and reservation Indians." *Id., citing County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258, 112 S.Ct. 683, 688, 116 L.Ed.2d 687, 697 (1992).

The first question to answer in Indian tax cases is who bears the legal incidence of the tax. *Id.* "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459, 115 S.Ct. at 2220, 132 L.Ed.2d at 409, *citing Moe*, 425 U.S. at 475-481, 96 S.Ct. at 1642-1645, 48 L.Ed.2d at 107-111. "But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and the federal law is not to the contrary, the State may impose its levy . . . and may place on a tribe or tribal members 'minimal burdens' in collecting the toll." *Id.* at 459, 115 S.Ct. at 2220, 132 L.Ed.2d at 409, *citing Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154-157, 100 S.Ct. 2069, 2081-2083,

65 L.Ed.2d 10, 29-32 (1980), and *Dept. of Taxation and Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73, 114 S.Ct. 2028, 2035-2036, 129 L.Ed.2d 52, 63-64 (1994).

The party who bears the legal incidence of the tax is distinct from the party who bears the economic burden. *Id.* at 460, 115 S.Ct. at 2221, 132 L.Ed.2d at 410. In determining who bears the legal incidence of the tax, absent clear language in the statute, the inquiry is one of "fair interpretation of the taxing statute as written and applied." *Id.* at 461, 115 S.Ct. at 2221, 132 L.Ed.2d at 411, *citing California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11, 106 S.Ct. 289, 290, 88 L.Ed.2d 9, 11-12 (1985).

In *Chickasaw Nation*, the United States Supreme Court analyzed several Oklahoma fuel statutes the state was attempting to levy within the Chickasaw Indian reservation. The format and language of those statutes are strikingly similar to those at issue in this case. For example, like I.C. § 63-2406(4) that requires the licensed distributor to collect and remit the fuel tax, Oklahoma's law requires fuel distributors to remit the amount of taxes due to the Tax Commission of that state on behalf of the retailer. *Id.* at 461, 115 S.Ct. 2221-2222, 132 L.Ed.2d at 410-411. Like I.C. § 63-2407(6), which allows the licensed distributor to deduct from future payments those taxes previously paid to the Commission that they are unable to collect from the buyer/retailer, Oklahoma's law allows distributors to deduct the uncollected amount from its future payments to the Tax Commission. *Id.* Similarly, both states' laws contain "no provision that sets off the retailer's liability when consumers fail to make payments due; neither are retailers compensated for their tax collection efforts. And, the tax imposed when a distributor sells

fuel to a reservation applies whether or not the fuel is ever purchased by a consumer." *Id.* at 462, 115 S.Ct. at 2222, 132 L.Ed.2d at 411. In addition, like I.C. § 63-2407(4), which credits the distributor to reimburse him for collecting and remitting the tax on behalf of the state of Idaho, Oklahoma law provides that "for their services as 'agent of the state for [tax] collection,' distributors retain a small portion of the taxes they collect." *Id.* at 462, 115 S.Ct. at 2222, 132 L.Ed.2d at 411.

The United States Supreme Court held in *Chickasaw Nation* "[t]he import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel; the motor fuel taxes are *legally imposed on the retailer* rather than on the distributor or the consumer." *Id.* at 462, 115 S.Ct. at 2222, 132 L.Ed.2d at 412-412, *citing Chickasaw Nation v. Oklahoma Tax Comm'n*, 31 F.3d 964 (10th Cir.1994) (emphasis added).

The Commission contends that the United States Supreme Court and the Idaho Supreme Court have held that earlier, similar tax statutes placed the tax on the entity paying the tax, *citing American Oil Co. v. Neill*, 86 Idaho 7, 383 P.2d 350 (1963), and *V-1 Oil Co. v. State Tax Comm'n*, 98 Idaho 140, 144, 559 P.2d 756 (1977). The taxing scheme at issue in *American Oil Co.* is distinguishable from the issue in this case, as it contained no "collect and remit" language, gave no credit or reimbursement for acting as a collecting agent for the state and gave no credit if funds become uncollectable from the purchaser. The Court in *V-1 Oil Co.* was simply following its own precedent in *American Oil.*

The district court held that the incidence of the tax fell on the consumer. The holding was based primarily on I.C. § 63-2410, which provides that consumers can get a refund if fifty or more gallons of fuel are used in equipment not operated on the highway. The Oklahoma tax scheme had a similar exception, yet it was not of enough significance for the United States Supreme Court to shift the incidence from the retailer to the consumer. *See Chickasaw Nation*, 31 F.3d at 971.

Even though the district court found the legal incidence of the tax was on the consumer, "[w]here a judgment of the trial court is based upon alternate grounds, if the judgment can be affirmed on one of the grounds the fact that the alternative ground may have been in error is of no consequence and may be disregarded." *Fischer v. Fischer*, 92 Idaho 379, 382, 443 P.2d 463, 466 (1968). Whether the incidence of the tax is held to be on the retailer or the consumer in this case, the outcome is the same. "[I]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Chickasaw Nation*, 31 F.3d at 971, *citing Moe*, 425 U.S. at 475-481, 96 S.Ct. at 1642-1645, 48 L.Ed.2d at 107-111.

V.

THE COURT NEED NOT CONSIDER THE ADDITIONAL ISSUE RAISED BY GOODMAN OIL.

Goodman Oil raised the issue of whether the Commission had the authority to assess fuel tax and transfer fees on fuel that does not "arrive" in Idaho, and, whether

Goodman Oil "received" or "owned" the fuel when it arrived in Idaho pursuant to Idaho fuel tax statutes. Because this Court has found that the Hayden-Cartwright Act does not provide Congressional authorization for a state to impose a fuel tax on the sale of fuel to Indians on Indian reservations within the state, and that the Idaho fuel tax and transfer fee statutes impose the legal incidence of the tax on the retailer, the determination of whether the transactions made by Goodman Oil are covered by the statutes is not necessary. The tax is not allowed.

VI.

CONCLUSION

The decision of the district court is affirmed. No costs or attorney fees on appeal.

Chief Justice TROUT, Justice WALTERS and Justices Pro Tem HART and HURLBUTT, concur.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GOODMAN OIL COMPANY OF LEWISTON and GOODMAN OIL COMPANY, Plaintiffs, -vs- THE IDAHO STATE TAX COMMISSION, Defendant.	Case No. CV-OC-98-03336*D MEMORANDUM DECISION (FILED AUG 27 1999)

The parties motions for summary judgment were heard on July 8, 1999. The Plaintiffs were represented by John McCreedy, and the Defendant was represented by Carl E. Olsson.

I. GOODMAN OIL COMPANY OF LEWISTON v. THE IDAHO STATE TAX COMMISSION

The plaintiff Goodman Oil Company of Lewiston (herein "Goodman Oil – Lewiston") is an Idaho corporation and at all times relevant was a licensed distributor of fuel in this state. Goodman Oil – Lewiston sells fuel to the Coeur d'Alene Indian Tribe (herein "Tribe"), a federally recognized Indian tribe. The Tribe sells that gasoline through the Benewah Auto Center (herein "Auto Center"), a business owned by the Tribe and located on its reservation. Neither the Tribe nor the Auto Center are fuel distributors licensed under Idaho law.

Goodman Oil – Lewiston purchases the gasoline from the Exxon Terminal in Spokane, Washington. Sun Transportation, a sister corporation of Goodman Oil – Lewiston, transports the gasoline through the State of Washington directly to the reservation, without traveling through any part of Idaho lying outside the reservation. At the border of the reservation, which is also the border of the State of Idaho, title to the gasoline passes to the Tribe, and it pays the costs for Sun Transportation to continue transporting the gasoline from the border to the Auto Center where it is unloaded.

The time period at issue involves the period from January 1997 through March 1998.

A. Does the Idaho Fuels Tax Act (I.C. §§ 63-2401 et seq.) require Goodman Oil – Lewiston to pay a tax on the fuel shipped to the Coeur d'Alene reservation?

The first issue is whether the Idaho Fuels Tax Act (I.C. §§ 63-2401 et seq.) requires Goodman Oil – Lewiston to pay a tax on the fuel shipped to the Coeur d'Alene reservation. Idaho Code § 63-2405(1) provides:

> An excise tax is hereby imposed on all gasoline . . . received. The tax is to be paid by the licensed distributor, and measured by the total number of gallons of gasoline . . . received by him, at the rate of twenty-five cents (25¢) per gallon. That tax, together with any penalty and/or interest due, shall be remitted with the monthly distributor's report required in section 63-2406, Idaho Code.

Section 63-2405(1) requires a licensed distributor to pay a tax of 25¢ per gallon on all gasoline received by the distributor. Goodman Oil – Lewiston is a licensed distributor. The question is whether it received the gasoline at issue in this case.

Idaho Code § 63-2403(4) defines what it means for gasoline to be received in the context of the facts of this case. That statute was amended effective July 1, 1997. Act approved March 13, 1997, ch. 85, § 1, 1997 Idaho Sess. Laws 203, 204; I.C. § 67-510. The relevant portions of that statute before and after the amendment provide as follows:

> Where gasoline . . . brought into this state by a licensed distributor is shipped or delivered directly to a person not licensed as a distributor, then the fuels shall be deemed to be received by the licensed distributor importing those fuels into this state. (Before amendment)
>
> (b) Gasoline . . . imported into this state by a licensed distributor and delivered directly to a person not a licensed distributor is received by the licensed distributor importing that fuel into this state at the time the fuel arrives in this state.
>
> (c) Fuel arrives in this state at the time it crosses the border of this state. (After Amendment)

The title to the act amending Idaho Code § 63-2404 stated that its purpose was to clarify the definition of receipt. This Court does not construe the amendment as intending to change the prior law. Gasoline is brought into this state when it crosses the border. Thus, the question is

whether the gasoline at issue was "brought into this state" by Goodman Oil – Lewiston.

Under the agreement between Goodman Oil – Lewiston and the Tribe, the gasoline was owned by Goodman Oil – Lewiston, and it paid the transportation costs, through the State of Washington to the Idaho border. At the border title to the gasoline transferred to the Tribe, and it paid the transportation costs from the border to the Auto Center where the gasoline was unloaded. Would this agreement regarding the passing of title and allocation of transportation costs mean that the gasoline was brought to this state, but not into this state, by Goodman Oil – Lewiston, and that therefore the gasoline was not received by Goodman Oil – Lewiston? This Court believes that this would be a strained interpretation of the statute. The borders of Washington and Idaho are not separated by a strip of land which belongs to neither state. Giving the statute a common sense interpretation, this Court holds that under the undisputed facts of this case the gasoline at issue was brought into this state by Goodman Oil – Lewiston, it was shipped or delivered directly to a person (the Tribe) not licensed as a distributor, and that Goodman Oil – Lewiston therefore received the gasoline. Thus, under the Fuels Tax Act, Goodman Oil – Lewiston is required to pay the tax on the gasoline. I.C. § 63-2405(1).

B. Where does the legal incidence of the tax fall?

Although there is no definitive formula for resolving the question of whether a state may exercise its authority over tribal members or reservation activities, the United

States Supreme Court has identified the relevant federal, tribal, and state interests to be considered in determining whether a particular exercise of state authority violates federal law. *Ramah Navaho School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). These interests tend to erect two independent but related barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be pre-empted by federal law or it may interfere with the tribe's ability to exercise its sovereign functions. *Ramah Navaho School Board, Inc. v. Bureau of Revenue of New Mexico, supra.* Pre-emption analysis requires a particularized examination of the relevant state, federal, and tribal interests. *Id.* Federal pre-emption is not an issue raised by the motions for summary judgment. The issue is whether the fuels tax interferes with the Tribe's ability to exercise its sovereign functions. A state tax interferes with the Tribe's ability to exercise its sovereign functions if the legal incidence of the tax falls on the Tribe or its members for sales made within the Tribe's reservation and Congress has not authorized such tax. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995).

There are three groups upon which the legal incidence of Idaho's fuels tax could fall: licensed fuel distributors, fuel retailers, and fuel consumers. If the legal incidence of the fuels tax falls upon fuel distributors, then the tax is enforceable against Goodman Oil – Lewiston. *Oklahoma Tax Commission v. Chickasaw Nation, supra.* If the legal incidence of the tax falls on fuel retailers, the tax is unenforceable because the Tribe is the retailer. *Oklahoma Tax Commission v. Chickasaw Nation, supra.* If the legal incidence of the fuels tax falls on consumers, then the tax

is unenforceable because those paying the tax would include Tribal members, but the state could amend the law to require the Tribe to collect the tax on sales made on the reservation to non-members of the Tribe, *Oklahoma Tax Commission v. Chickasaw Nation, supra*, or it could impose other measures designed to make sure that untaxed fuel is not sold to non-members of the Tribe, *Department of Taxation and Finance v. Hilhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994).

There is a difference between the legal incidence of a tax and the economic burden of that tax. *Ramah Navajo School Board, Inc. v. Bureau of Revenue, supra* at 844 n. 8. The economic burden of a tax could be upon the Tribe or its members even though the legal incidence of the tax is upon the non-Indian business. The question is not whether it is economically feasible, considering market conditions, for the entity required to pay the tax to shift the cost of the tax to others. It is significant, however, if the statutory framework does produce that shifting of the burden of the tax from the person required to remit the tax to the state to another person.

The legal incidence of a tax does not fall automatically upon the person who is legally liable for its payment. *Oklahoma Tax Commission v. Chickasaw Nation, supra* (legal incidence on retailer even though distributor obligated to pay the tax to the state); *United States v. State Tax Commission*, 421 U.S. 599 (1975). Thus, one person could be legally obligated to pay the tax, but its legal incidence could fall upon another. The legal incidence of a tax can fall upon persons not legally obligated to pay that tax even if the law does not contain any "pass through" provision requiring that the cost of the tax be passed on

to those other persons. *Oklahoma Tax Commission v. Chickasaw Nation, supra; California Board of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9 (1985). Thus, although Idaho Code § 63-2405(1) provides that the fuels tax is to be paid by licensed distributors, that does not answer the question of who bears the legal incidence of the tax.[1] Because the Idaho Motor Fuels Tax Act does not expressly identify who bears the tax's legal incidence, the question is one of fair interpretation of the Act as written and applied. *Oklahoma Tax Commission v. Chickasaw Nation, supra; California State Board of Equalization v. Chemehuevi Indian Tribe, supra.*

A licensed distributor who receives gasoline in Idaho and then exports it out of state is not required to pay the fuels tax on that gasoline if the out-of-state purchaser either is a licensed distributor in the jurisdiction where the gasoline is destined or is not a licensed distributor but pays any tax due on the gasoline in that jurisdiction. I.C. § 63-2407(1). This provision supports an inference that the tax obligation is not legally the distributor's. In this circumstance the distributor is not required to pay the tax where the cost of the tax cannot be passed on to a consumer in Idaho.

If a licensed distributor receives gasoline in Idaho and that gasoline is destroyed through some calamity, the

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[1] These decisions by the United States Supreme Court undermine the continuing authority of *American Oil Co. v. Neill,* 380 U.S. 451 (1965), which upheld a finding that the operating incidence of the fuel tax fell on the dealer because the taxable event was the receipt of the fuel by the dealer and the dealer was not required to pass the tax on to the consumer.

distributor does not have to pay a tax on that gasoline. I.C. § 63-2407(3). This provision supports an inference that the tax obligation is not legally the distributor's. In this circumstance the distributor is not required to pay the tax where the cost of the tax cannot be passed on to a consumer in Idaho.

A licensed distributor is relieved from paying tax on a percentage of the gasoline he receives in order "to reimburse him for the expense incurred on behalf of the state of Idaho in collecting and remitting gasoline . . . fuel tax moneys, maintaining necessary records for the state, preparing necessary reports and remittances in compliance with this chapter, and for loss from evaporation, handling spillage and shrinkage," except casualty losses. I.C. § 63-2407(4). He is compensated for "collecting and remitting gasoline . . . fuel tax moneys." Collecting taxes from whom? Himself? He is also given a credit for gasoline presumed lost "from evaporation, handling, spillage and shrinkage" – gasoline for which the cost of the tax cannot be passed on to a consumer in Idaho. These provisions support an interference that the tax obligation is not legally the distributors.

Idaho Code § 63-2407(4) also provides that the licensed distributor can receive a credit "to cover shrinkage, evaporation, spillage and handling losses of a retail dealer" if the distributor also granted such credit to the retail dealer or paid it to him. This provision likewise supports and [sic] inference that the tax obligation is not legally the distributor's. A consumer cannot pay tax on gasoline lost by the retail dealer through shrinkage, evaporation, spillage, or handling.

If a licensed distributor sells gasoline upon which he has paid the fuels tax and is subsequently unable to collect the sale price for that gasoline, the distributor is entitled to a credit or refund for the fuels tax paid by the distributor on that gasoline. I.C. § 63-2407(6). This provision supports the inference that the tax obligation is not legally on the distributor, *Oklahoma Tax Commission v. Chickasaw Nation, supra.*

Under Idaho's Fuels Tax law, neither a retail dealer nor a consumer can purchase, receive, or accept gasoline from anyone other than a licensed distributor.[2] The effect of this statute is to require retail dealers in Idaho to purchase taxed gasoline, and then to require consumers in Idaho to purchase taxed gasoline. A consumer (other than an Indian purchasing gasoline on his or her reservation) cannot lawfully purchase gasoline in Idaho unless Idaho's fuels tax has been imposed on that gasoline. The consumer's only lawful source of gasoline on which Idaho's fuels tax has not bee imposed would be from a seller located in another state. The consumer could not bring more than thirty gallons of such gasoline into Idaho, however, without paying a use tax on it an amount per gallon equal to the fuels tax.[3] The effect of these

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[2] 63-2411. Purchase of gasoline by retailer dealers. – It shall be unlawful for any retail dealer in gasoline or aircraft engine fuel or for any person in the state of Idaho other than a licensed distributor to purchase, receive or accept any gasoline from any other person, unless that person is a licensed distributor. Any person in violation of these provisions shall be guilty of a misdemeanor.

[3] 63-2402. Imposition of tax upon use. – (1) A tax is hereby imposed for the privilege of using the public highways upon the

statutes is to ensure that gasoline purchased or used by consumers in Idaho is gasoline on which the fuels tax has been imposed. This supports the inference that the legal incidence of Idaho's Fuels tax is born [sic] by consumers.

A consumer, who purchases more than 50 gallons of gasoline in Idaho and uses that gasoline in vehicle outside of Idaho where he pays a duplicate tax on the gasoline, is entitled to a "refund" of the tax paid in this state.[4] A consumer who purchases 50 or more gallons of

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use or possession for use of gasoline, and the tax shall be imposed without regard to whether use is on a government basis or otherwise.

(2) The tax imposed in this section shall be at the same rate as specified in section 63-2405, Idaho Code, upon each gallon of gasoline used or possessed for use. This tax shall be subject to the deductions and refunds set forth in this chapter.

(3) Any person coming into this state in a motor vehicle may transport in the manufacturer's original tank of that vehicle, for his own use only, not more than thirty (30) gallons of gasoline for the purpose of operating that motor vehicle, without complying with the provisions of this chapter.

(4) This use tax shall be a debt owing from the user to the state of Idaho.

[4] 63-2410. Refund of gasoline tax procedure. – (1) Any person who shall purchase fifty (50) gallons or more, and use the gasoline in motor vehicles operated on highways outside of the state of Idaho where a duplicate tax is assessed for the same gasoline, shall be entitled to refund when a claim is presented to the commission in the manner required in subsection (5)(c) of this section. Claimant shall present to the commission a statement accompanied by a verification of the use determined by an audit of his operations conducted as prescribed by the tax commission; or his claim may be verified by the filing of a receipt or proof showing the payment of tax on the gasoline used in any other state.

gasoline during a calendar year and uses that gasoline in certain types of equipment or vehicles that are not operated on highways is likewise entitled "to be refunded the amount of gasoline tax previously paid on that gasoline."[5] That a consumer is, in certain instances, entitled to a "refund" of the gasoline tax "previously paid" on the gasoline shows that the Idaho fuels tax statutes are structured to ensure that the legal incidence of the fuels tax falls on consumers. To refund the tax is to pay it back.

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[5] 63-2410. Refund of gasoline tax procedure. – (1). . . .

(2) Any person who shall purchase within any one (1) calendar year fifty (50) gallons or more of gasoline used for the purposes described in this subsection shall be entitled to be refunded the amount of gasoline tax previously paid on that gasoline. Exempt uses are:

(a) Operating stationary gasoline engines;

(b) Propelling equipment or vehicles, other than motor vehicles, which are not operated on a highway; and

(c) Operating commercial motor boats.

(3) No refund of gasoline tax shall be allowed for any gasoline which is:

(a) Used in motor vehicles required to be licensed or used in any motor vehicle exempt from registration by reason of the ownership or residence; or

(b) Aircraft engine fuel placed in aircraft, provided however, if tax has been paid at the rate provided in section 63-2405, Idaho Code, on any motor fuel placed in the fuel supply tank of an aircraft the user of the fuel may apply for a refund of the difference between the tax paid on the fuel and the tax imposed in section 63-2408, Idaho Code; or

(c) Gasoline used in recreational vehicles; or

(d) Gasoline used in noncommercial motor boats or in boats operated by a governmental entity.

Considering the language used and the structure of the Idaho Fuels Tax Act, the fuel taxes are legally imposed on the consumer rather than the licensed distributor. Although the licensed distributor pays the tax, the Act is structured so that the legal imposition of the tax is shifted to consumers. With the legal incidence of the tax on consumers, the tax cannot be imposed upon all gasoline purchased by the Tribe for sale on its reservation. *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). The State certainly could require the Tribe to pay a tax upon gasoline it sells to non-members of the Tribe. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979). It has not chosen to do so, however, although the Tribe has periodically remitted fuel tax payments to the state for sales to non-members of the Tribe.

C. Does section 10 of the Hayden-Cartwright Act authorize Idaho to tax sales of gasoline made on the Coeur d'Alene reservation to tribal members?

The Tax Commission argues that if the legal incidence of the fuels tax is born [sic] by either the Tribe or its members, such tax is authorized by section 10 of the Hayden-Cartwright Act. A State may impose a tax on gasoline sold on the reservation by the Tribe to its own members only if Congress has made it unmistakably clear that it has authorized such taxation. *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998); *County of Yakima v. Confederated Tribes and bands of the Yakima Indian Nation, supra.* Such statutes are to be construed

liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe of Nations*, 471 U.S. 759 (1985).

Section 10 of the Hayden-Cartwright Act (4 U.S.C. § 104) is as follows:

> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation may be located.

At issue is the meaning of the phrase "located on United States military or other reservations." Do "other reservations" include Indian reservations? The Tax Commission argues that "other reservations" must include Indian reservations because the phrase "licensed traders" could only refer to persons licensed to trade with Indians.

Beginning with Oregon in 1919, states began funding road construction and maintenance with taxes on motor fuels. In 1934, the United States Supreme Court held that fuel sold to the public on the Presidio, a federal military reservation in San Francisco, was not subject to the California fuels tax. *Standard Oil Co. v. California*, 291 U.S. 242

Goodman Oil's claim that it exports fuel from Washington defeats its claim that it does not import fuel into Idaho. Because it imports fuel into Idaho and delivers it directly to a person who is not a licensed distributor, Goodman Oil is liable for the tax and transfer fee.

Goodman's Third Argument:
Idaho Cannot Tax Goodman Oil Because Goodman Oil Is An Indian Trader and as Such Is Beyond the State's Reach.

The federal Indian trader statutes are found at 25 U.S.C. §§ 261-264. These statutes were enacted to prevent fraud and other abuses by persons trading with Indians. They were enacted to protect Indians, not Indian traders. *Central Machinery Co. v. Arizona Tax Commission*, 448 U.S. 160, 100 S.Ct. 2592 (1980). This being so, it follows that if the tax can be either: (1) directly imposed upon or (2) passed on to the Indians, then the Indian trader statutes will not insulate Goodman from responsibility for paying the tax. The cases discussed below support this point.

In *Central Machinery*, a corporation sold farm equipment to a farming operation owned by an Indian tribe. The incidence of the "transaction privilege tax" fell on the seller, not the tribe. The seller successfully contended that the tax could not be imposed on a sale that took place on the reservation because the tax was preempted by the Indian trader statutes.

Central Machinery is a continuation of the doctrine set forth in *Warren Trading Post Co. v. Arizona Tax Commission*, 380, U.S. 685, 85 S.Ct. 1242 (1965). In *Warren*, the Court struck down Arizona's attempt to impose a gross receipts

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tax upon an Indian trader located on a reservation. The Court characterized this as a tax "upon Indian traders for trading with Indians." Broad language in *Warren* indicates that Indian traders trading on a reservation with reservation Indians are immune from state tax, not simply because the transactions take place on the reservation, but rather because Congress has undertaken to regulate reservation trading in so comprehensive a way that there is no room for states to legislate on the subject.

The absolute position of *Warren* and *Central Machinery* has since been eroded significantly. In *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 114 S.Ct. 2028 (1994), an Indian trader attacked New York's cigarette tax program. The incidence of New York's tax fell on the individual retail buyer, but it was precollected by licensed agents who purchased stamps and attached them to cigarette packs in advance of the first sale. New York determined that large quantities of cigarettes were escaping tax because they were being sold without stamps to tribes and tribal retailers who in turn sold them to both reservation Indians and to non-Indian consumers. Relying on *Moe, supra*, the Court stated that New York lacked authority to tax cigarettes sold to tribal members for their own consumption. The Court, however, also cited *Confederated Tribes, supra*, for the proposition that on-reservation cigarette sales to the persons other than enrolled members for their own consumption on the reservation are subject to taxation. The Court then upheld New York cigarette tax regulations that imposed a duty to precollect tax on an Indian trader who supplied tribes and tribal retailers. The regulations created a quota system that allowed the Indian trader to

11/30/01 FRI 17:27 FAX 402 342 5440 COCKLE PRINTING 069

sell unstamped cigarettes in sufficient numbers to guarantee that individual reservation Indians would be able to purchase cigarettes without paying tax. The regulations required the Indian trader to keep records of tax-exempt sales, to make certain that a buyer held a valid state exemption certificate, to obtain a state license, and to make monthly reports to the state. *Milhelm Attea* permits the state to require compliance with its statutes and regulations to an extent not permitted by the earlier cases.

Especially in light of *Milhelm Attea*, the proper question is not whether the Indian trader statutes are implicated, but whether a tax can be directly imposed upon, or passed on to, the enrolled members of the Tribe. If it can be, then the Indian trader statutes are not a device by which the Indian trader can avoid paying tax. It is inconceivable that the Indian trader receive more protection from state taxation than the Indians involved. The Indian trader statutes are not, after all, for the protection of the trader, but for the Indian. *Central Machinery, supra.*

Goodman's Fourth Argument:
The Legal Incidence of the Fuels Tax
Impermissibly Falls on the Indian Consumer.

It is a basic principle that when a state seeks to impose the legal incidence of a tax directly on a tribe or tribal members living on a reservation, it must have specific Congressional consent to do so. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214 (1995). In *Chickasaw*, it was not clear on the face of the statute who bore the legal incidence of the tax. After reviewing the statutory framework, the Court concluded

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that the incidence of the tax fell on the retail consumer. When the retail consumer is a tribal member living on a reservation or in "Indian country"[1], the state is without authority to levy the tax absent specific Congressional consent. There was no such consent and the Court struck down Oklahoma's attempt to collect fuels tax from Indian consumers.

Goodman argues that Idaho's fuels tax is similarly unclear as to the legal incidence of the tax and must therefore suffer the same fate as Oklahoma's. The Commission disagrees. The statute is clear; the legal incidence of Idaho's fuels tax falls on the first receiver of fuel. Idaho Code § 63-2405 states in pertinent part:

> An excise tax is hereby imposed on all gasoline . . . received. *The tax is to be paid by the licensed distributor,* and measured by the total number of gallons of gasoline . . . received by him
>
> . . . .
>
> (Emphasis added.)

The tax may be passed on to the ultimate consumer, but this is an entirely different matter than imposing the tax directly on the retail consumer. As Goodman itself notes in its "Post Hearing Memorandum," *Chickasaw* speaks directly to the importance of the distinction.

> The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax. If the legal incidence of

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[1] There are no reservations in Oklahoma. The state is "Indian country." The analysis is the same for each.

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> an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. . . . But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state and tribal interests favors the State, and federal law is not to the contrary, the state may impose its levy. . . .

Chickasaw, 515 U.S. 458-59.

There is no federal law denying Idaho the right to impose either fuels tax or transfer fee. The real question in this case, then, is whether the balance of federal, state and tribal interests favors the state.

Goodman's Fifth Argument: The Balance of Federal, State and Tribal Interests Does Not Favor Allowing the State to Impose it Fuels Tax.

This is the heart of the matter. Idaho's fuels tax and transfer fee can be imposed on a taxpayer who will in turn pass it on to the Tribe and tribal members only if the balance of federal, state and tribal interests favors the state. In this case it does.

It is instructive to analyze cases in which the balance of interests did not favor the state in order to show why the facts in those cases differ significantly from the facts in this case.

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578 (1980), the Court struck down Arizona's attempt to collect a motor carrier license tax and its fuels use tax. A non-Indian logging company felled

11/30/01 FRI 17:28 FAX 402 342 5440 COCKLE PRINTING 072

tribal timber on the Fort Apache Reservation and transported it to the tribal organization's sawmill. The logger's activities were conducted solely on the reservation. Log hauling was done solely on Bureau of Indian Affairs (BIA) and tribal roads.

In balancing the competing interests, the Court noted that Arizona had only a generalized interest in raising revenue. As to the federal government's interest, the Court found that imposition of the tax would undermine federal policy of assuring that the profits from timber sales would inure to the benefit of the tribe. Further, the tax would undermine the Secretary of the Interior's ability to make determinations in his authority concerning the setting of rates and fees with respect to the harvesting and sale of tribal timber, and would adversely affect the tribe's ability to comply with federally mandated sustained-yield policies.

As to the tribe's interest, the revenue used to fund the tribal government was derived almost exclusively from tribal enterprises, and timber sales accounted for over 90% of the tribe's total annual profits.

The Court also found that the federal government's regulations regarding the harvesting, sale and management of tribal timber, and of BIA and tribal roads, was so pervasive that imposition of state tax was precluded.

By contrast, Idaho's interest in this case is not limited to general revenue raising. Fuels tax and transfer fees are earmarked for dedicated funds. In the case of fuels tax, Idaho Code § 63-2412 provides that all but a comparatively small amount of the fuels tax collected goes to the highway distribution account created by Idaho Code

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§ 40-701. The disbursements from this fund are used for construction and maintenance of state and local highways and for highway safety purposes. The less money in the fund, the worse the roads. The more money in the fund, the better the roads, including those located on the Coeur d'Alene reservation.

Idaho also has an interest in ensuring that competing business located in the state operate on a level playing field. The Commission notes that there is a non-Indian owned service station directly across the state highway from the Auto Center, the suppliers of which collect Idaho fuels tax and transfer fee. Furthermore, the Tribe itself operates yet a third station, the supplier of which remits fuels tax to Idaho and passes the cost along to the Tribe.

As to the Tribe's interests, the reservation is served by roads maintained with fuels tax revenues. The Auto Center itself is located on a state highway. The Tribe also operates a casino located on a state highway. Obviously, it is to the Tribe's advantage to have good access to its casino and the Auto Center. That access is provided chiefly by highways maintained with fuels tax dollars. In addition, unlike *White Mountain Apache*, there is no suggestion that the Tribe depends for a significant part of its revenue on the sale of gasoline. In that respect, imposition of fuels tax and transfer fee on Goodman will not adversely affect the Tribe or tribal members, particularly since not all the savings had by not remitting tax are passed on to the Tribe now. Goodman retains a significant portion of the savings.

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Goodman argues that the tribal interest will be adversely affected because tribal members will pay higher rates for gasoline. There is no evidence to support this assertion. Part of the money saved by not remitting fuels tax is retained by Goodman. Of the remainder, there is no evidence to suggest that the Tribe passes any of the savings on to individual tribal members. In fact, the evidence suggests otherwise. The Tribe does send the Commission money at intermittent intervals that allegedly reflects the tax due from sales of fuel to non-Indians. To assert that tribal members get any benefit from tax savings implies that fuel is sold at different prices to Indians and non-Indians. There is no evidence to suggest that this unusual business practice is in fact followed.

As to the federal interests, the first thing to note is that the pervasive federal regulation found in *White Mountain Apache* does not exist here. There is no suggestion that imposition of either fuels tax or transfer fee on Goodman has any effect on the Secretary of the Interior or on the Tribe's ability to comply with federally mandated policies. On the other hand, it is distinctly in the federal interest to maintain good quality roads and highways. (The Commission notes that the Congress has just passed the costliest highway funding bill in history.) Northern Idaho's main north-south highway runs through the Coeur d'Alene reservation and serves the reservation, interstate and interstate commerce. The state's ability to maintain its highways is diminished when the fund used to provide money for highway maintenance does not receive either fuels tax or transfer fee revenue from Goodman Oil.

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Another case that gives insight into how properly to balance the state, federal and tribal interests is *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico.*, 458 U.S. 832, 102 S.Ct. 3394 (1982), in which the Court struck down a gross receipts tax paid by a non-Indian contractor to the state. The analysis was similar to that in *White Mountain Apache*. The Court held that federal law preempted the state tax imposed on gross receipts a non-Indian construction company received from a tribal school board for construction of a school for Indian children on the reservation. The Court noted that the state's interest was only general revenue raising. The federal and tribal interests, as reflected in comprehensive and pervasive regulations regarding the construction and financing of Indian educational institutions, lay in promoting the quality and quantity of educational opportunities for Indians. These would be adversely affected if the additional burden of a state tax was permitted.

Once again, the present situation is substantially different. The state is not engaged in general revenue raising. It is engaged in raising a revenue for a dedicated fund which benefits the Tribe. There are no pervasive federal regulations at issue here. There is no evidence of any significant adverse impact either to the Tribe or to tribal members that arises from collecting the fuels tax and transfer fee from the non-Indian distributor. On the contrary, good highways serve both tribal members and important economic interests of the Tribe. The fuels tax is directly related to the maintenance of those highways.

Finally, the Commission notes that it is not the case that all fuel sold to Indians on the reservation must be sold tax free. Tax free fuel must be sold *and consumed* on

076 COCKLE PRINTING 11/30/01 FRI 17:29 FAX 402 342 5440 077

the reservation. *Milhelm Attea*, 512 U.S. at 64. But the purpose of fuel is to make purchasers mobile. The only effective way to collect tax on fuel sold to Indians which is consumed off the reservation is to impose it on the distributor. This is what Idaho has done.

The Hayden-Cartwright Act Authorizes States to Tax Motor Fuel Sales.

A state may impose the legal incidence of a tax directly on a tribe or tribal member living on the reservation if it has specific Congressional consent to do so. *Chickasaw, supra.* The Hayden-Cartwright Act, 4 U.S.C. § 104, expressly authorizes states to tax motor fuel sales on "United States military or other reservations." The word "reservations" encompasses the Coeur d'Alene reservation. Congress has in this statute given its express consent to allow states to directly tax fuels sold on the reservation. Given Congressional consent to direct taxation of Indians, states can surely tax non-Indian distributors who sell fuel to tribal members or the Tribe.

Given these considerations, the Commission finds that the balance of interests regarding imposition of fuels tax and the transfer fee favors the state. Imposition of penalty, however, is reversed and credit is hereby given for those amounts of tax voluntarily remitted to the Commission by the Tribe. All such amounts are applied to the fuels tax.

WHEREFORE, the Notices of Deficiency Determination that are the subject of this decision are hereby APPROVED, AFFIRMED and MADE FINAL AS MODIFIED.

11/30/01 FRI 17:29 FAX 402 342 5440 COCKLE PRINTING

IT IS ORDERED and THIS DOES ORDER that Goodman Oil of Lewiston pay the following fuel taxes, transfer fee and interest, calculated through July 14, 1998.

PERIOD	AMOUNT DUE (Tax & Fee)	INTEREST (Tax & Fee)	TOTAL
September 1997 through March 1998	$8,913	$ 560	$9,473
		TOTAL DUE	$9,473

DEMAND for immediate payment for the foregoing amount is hereby made and given.

An explanation of the taxpayer's right to appeal this decision is enclosed.

DATED this 28th day of September, 1998.

IDAHO STATE TAX COMMISSION

/s/ DeWayne T Hammond, Jr.
COMMISSIONER

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 1998, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

Goodman Oil of Lewiston, Receipt # P 294 630 377
PO Box 2578
Boise ID 83701

John McCreedy
Jim Jones & Associates
1275 Shoreline Way
Boise ID 83702

/s/ Beverly Barr

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In the Supreme Court of the State of Idaho

GOODMAN OIL COMPANY OF LEWISTON, an Idaho corporation; and GOODMAN OIL COMPANY, an Idaho corporation, Plaintiffs-Respondents, v. IDAHO STATE TAX COMMISSION, Defendant-Appellant.	ORDER DENYING PETITION FOR REHEARING No. 25994 Ref. No. 01RH-24

Appellant filed a PETITION FOR REHEARING on June 28, 2001 and supporting MEMORANDUM on July 10, 2001. Therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 27th day of July, 2001.

By Order of the Supreme Court

/s/ Lois Dawson
Lois Dawson,
Chief Deputy Clerk for
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Cherie C. Copsey

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Supreme Court, U.S.
FILED
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No. 01-794

In The

Supreme Court of the United States

IDAHO STATE TAX COMMISSION,

Petitioner,

v.

GOODMAN OIL COMPANY OF LEWISTON, an Idaho Corporation; and GOODMAN OIL COMPANY, an Idaho Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. MCCREEDY
Counsel of Record
NAYLOR, HALES & MCCREEDY, P.C.
1199 N. Shoreline Lane, Suite 200
P.O. Box 9496
Boise, ID 83707
Phone: (208) 383-9511

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to this proceeding are correctly stated in the caption of the case. The Coeur d'Alene Indian Tribe (Tribe) was granted permission to file an *amicus curiae* brief with the Idaho Supreme Court. The Tribe was not allowed to participate in oral argument before the Idaho Supreme Court. The Tribe did not seek permission to intervene in this case until after the Idaho Supreme Court determined that the tax at issue is unconstitutional. The Tribe's petition for leave to intervene was not acted upon by the Idaho Supreme Court.

Goodman Oil Company and Goodman Oil Company of Lewiston are closely held Idaho corporations. Goodman Oil Company is the parent corporation of Goodman Oil Company of Lewiston.

TABLE OF CONTENTS

Page

Parties to the Proceeding and Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Authorities iii

Statement of Facts 1

Reasons for Denying the Writ 2

A. The Issue is Important, But Should Be Left For Congress to Decide 2

B. The Idaho Supreme Court Correctly Decided the Issue 3

Conclusion 6

TABLE OF AUTHORITIES

Page

CASES

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1985) 2

Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) 3

Falls City Brewing Company v. Reeves, 40 F. Supp. 35 (D. Ky. 1941) 4

Matter of the State Motor Fuel Tax Liability of A.G.E. Corporation, 273 N.W. 2d 737 (S.D. 1978) 2

Montana v. Blackfeet Tribe, 471 U.S. 759 (1984) 3

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 2

Warren Trading Post Co. v. Arizona Tax Com'n, 350 U.S. 685 (1965) 4

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 2, 5

STATUTES

23 U.S.C. § 120 1

23 U.S.C. § 204 1

Buck Act, 4 U.S.C. §§ 105-110, Pub. L. 819, 54 Stat. 1059 4

Hayden-Cartwright Act, 4 U.S.C. § 104 ..... *passim*

LEGISLATIVE HISTORY

S. Rep. No. 1625, 76th Cong., 3d Sess. (1940) 4

TABLE OF AUTHORITIES – Continued

Page

PROPOSED LEGISLATION

H.R. No. 3966, 105th Cong., 2d Sess. (1998) 5

S. 550, 106th Cong., 1st Sess. (1999) 5

STATEMENT OF FACTS

The Idaho State Tax Commission (Commission) includes a significant misstatement of fact in its petition. The suggestion that Indians are free riders on State highways is erroneous. Congress provides funding to States for construction of State highways on Indian reservations, 23 U.S.C. § 120, and Congress provides funding to the Department of Interior, Bureau of Indian Affairs (BIA) for construction and maintenance of BIA and tribal roads on Indian reservations. 23 U.S.C. § 204.

The record in this case shows that from 1993 to 2003, the Idaho Transportation Department received or budgeted $56.8 million for road construction on State highways within the Coeur d'Alene Indian Reservation (Reservation). Of that amount, $43 million was received or budgeted from federal sources. By comparison, in 1997 and 1998, the Tribe received from the BIA a little less than $100,000 each year for maintenance of BIA and tribal roads on the Reservation.

Two factual omissions also warrant attention. In 1994, the Tribe and the Commission agreed the Tribe would remit fuel taxes to the Commission on gasoline sales made to non-Indians. The Tribe made the payments to the Commission until the Idaho Supreme Court declared the tax unconstitutional.

Second, Respondents were authorized by the Tribe to conduct business on the Reservation. The Tribe issued Goodman Oil Company a business license, and Goodman Oil Company of Lewiston has permission to use the license.

These facts show what the Commission ignores. A statutory scheme already exists that provides States with funding for road construction on Indian reservations. Congress would certainly want to debate the existing statutory scheme before it authorized any new tax on Indians.

REASONS FOR DENYING THE WRIT

A. The Issue Is Important, But Should Be Left For Congress To Decide.

Respondents agree that allowing States to tax fuel sold on Indian reservations raises difficult social and economic issues. This is because "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17 (1985).

The Idaho Supreme Court is the only court to squarely address the issue of whether the Hayden-Cartwright Act (Act), 4 U.S.C. § 104, authorizes States to tax fuel sold on Indian reservations. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), this Court recognized but did not decide the issue. All that can be said of *Matter of the State Motor Fuel Tax Liability of A.G.E. Corporation*, 273 N.W. 2d 737 (S.D. 1978), is that the South Dakota Supreme Court simply did not engage in a detailed analysis of the Act or apply the correct rules of construction.

The Idaho Supreme Court did analyze the Act in detail, and did apply the rules of construction applicable to State taxation of Indians. If changes are to be made, it is a matter best done by the Congress.

B. The Idaho Supreme Court Correctly Decided The Issue.

The Commission advances two criticisms of the Idaho Supreme Court decision. The Commission argues that the term "licensed trader" is almost always used to mean one licensed to trade with Indians and, therefore, use of the term in Section 10 of the Act is an indication that Congress wanted States to have authority to collect fuel tax on Indian reservations. Second, the Commission argues that Congress endorsed a 1940 administrative opinion when it re-enacted the Act in 1947 and 1956. The Idaho Supreme Court correctly rejected these arguments.

The Commission steadfastly ignores two rules of construction applicable to taxing Indians. First, States may tax Indians only when Congress has made its intention to do so unmistakably clear. *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). Second, statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1984).

The Idaho Supreme Court correctly determined that the Act itself does not unmistakably authorize the tax. The Act contains four sections using the term "reservation" or "reservations." Two of the four sections use the term "reservation" in conjunction with the term "Indian." The deliberate use and non-use of the word "Indian"

means Congress did not intend the tax. Congress could have unmistakably authorized the tax on Indians by simply using in Section 10 of the Act the same terms used in Sections 3 and 6 to regulate Indian affairs.

The Idaho Supreme Court also correctly determined that use of the term "licensed trader" is not a substitute for unmistakably clear authority to tax Indians. *Falls City Brewing Company v. Reeves*, 40 F. Supp. 35 (D. Ky. 1941), shows that the term did not mean only those licensed to trade with Indians. It is just as probable that the term "licensed trader" was a reference to distributors or sellers of goods on all federal reservations, including national parks and military reservations. At best, use of the term "licensed trader" is ambiguous.

Legislative history regarding the Buck Act shows that Congress did not intend to give States authority to tax fuel sales on Indian reservations. Congress adopted the Buck Act in 1940. Pub. L. 819, 54 Stat. 1059. Congress intended the Buck Act and the Hayden-Cartwright Act to govern the same "Federal areas." S. Rep. No. 1625 at 4-5, 76th Cong., 3d Sess. (1940). The Buck Act, 4 U.S.C. §§ 105-110, does not apply to Indian reservations. *Warren Trading Post Co. v. Arizona Tax Com'n*, 350 U.S. 685 (1965). It follows that in 1936 Congress did not intend the Hayden-Cartwright Act to apply to Indian reservations.

Several points weigh strongly against the Commission's position that Congress has adopted the 1940 opinion of the Solicitor of the Department of Interior. Had Congress intended to allow States to tax fuel sales on Indian reservations, some specific mention of regulating tribal affairs would appear in Congressional Reports for

1936 or in minutes of the floor discussions in one of the Houses. No such record of any Congressional debate exists. Forty years passed before States mentioned the Act in cases before the United States Supreme Court. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1979). Unmistakably clear authority to tax Indians would not lay dormant for forty years.

In 1994, the Commission itself concluded that the Act does not authorize the tax. The Commission's agreement to collect from the Tribe the tax on non-Indian fuel sales was unnecessary if the Act already authorized the tax on the Reservation.

And, finally, in 1998 and 1999, Congress considered but rejected two bills that would have allowed States to tax fuel sales on Indian reservations. H.R. No. 3966, 105th Cong., 2d Sess. (1998) and S. 550, 106th Cong., 1st Sess. (1999). New legislation would be unnecessary if, as the Commission argues, Congress authorized States to levy the tax in 1936.

The Idaho Supreme Court correctly determined that the Hayden-Cartwright Act is not unmistakably clear authority to tax fuel sales made on Indian reservations. The Act itself is ambiguous, at best, and ambiguities in tax statutes are construed in favor of Indians. This case does not warrant further review by the Court.

CONCLUSION

Respondents respectfully request that the petition be denied.

Respectfully submitted,

JOHN C. MCCREEDY
NAYLOR, HALES & MCCREEDY, P.C.
1199 N. Shoreline Lane, Suite 200
P.O. Box 9496
Boise, ID 83707
Phone: (208) 383-9511

Counsel for Respondents

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No. 01-794

In The

Supreme Court of the United States

IDAHO STATE TAX COMMISSION,

Petitioner,

v.

GOODMAN OIL COMPANY OF LEWISTON, an Idaho Corporation; and GOODMAN OIL COMPANY, an Idaho Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALAN G. LANCE
Attorney General

CARL E. OLSSON*
Deputy Attorney General
IDAHO STATE TAX COMMISSION
800 Park Blvd. Plaza IV
P.O. Box 36
Boise, ID 83722-0410
(208) 334-7530
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

Comments on Respondents' Statement of Facts..... 1

Comments on Respondents' Reasons for Denying the Writ..... 3

Conclusion 4

TABLE OF AUTHORITIES

CASES

Falls City Brewing Company v. Reeves, 40 F.Supp 35 (D. Ky. 1941)..... 3

STATUTES

23 U.S.C. § 120.....1, 2

Buck Act, Pub. L. 819, 54 Stat. 1059 [1940]..... 4

Hayden-Cartwright Act, 4 U.S.C. § 104..... 3

OTHER AUTHORITIES

57 Interior Dec. 129 at 139 (1940)..... 3

COMMENTS ON RESPONDENTS' STATEMENT OF FACTS

Respondents assert the Idaho State Tax Commission (Commission) included a significant misstatement of fact in its petition. It did not.

The supposed misstatement is the suggestion that Indians are free riders on state highways. Respondents point to 23 U.S.C. § 120 for the proposition that Indians are not free riders if they do not pay state motor fuel tax because the federal government already provides funding to states for construction of state highways on Indian Reservations. Petitioners further note that Congress provides funding for construction and maintenance of Bureau of Indian Affairs (BIA) and tribal roads. As to these small, secondary roads, their relative importance is revealed in the funding figures respondents recite. In the ten-year period from 1993 to 2003, the Idaho Transportation Department budgeted $56.8 million for road construction on state highways within the Coeur d'Alene Indian Reservation (Reservation). Federal funds expended on BIA and tribal roads were less than $100,000 in 1997 and a similar amount in 1998.

More importantly, 23 U.S.C. § 120 does not support the proposition that the federal government reimburses states for fuel tax money Indians do not pay. This section has a long history, but its essential purpose is to help states defray the costs of road construction and maintenance whether they have Indian reservations or not. The statute provides for a basic federal share of road costs. One subsection provides for increasing that share for

states having more than 5% of their area taken in nontaxable Indian lands and public domain lands. It is possible under this subsection for a state to have an Indian reservation and receive no extra funding. It is equally possible for a state to receive additional federal funding without the presence of an Indian reservation. Pursuant to another subsection, it is possible for a state to receive additional funding without the presence of an Indian Reservation. It is illogical to maintain that the federal funding distributed pursuant to 23 U.S.C. § 120 is compensation to states for fuel taxes they do not collect from Indians.

Respondents also draw attention to the fact that the Commission received payment from the Coeur d'Alene Tribe (Tribe) for fuel tax on sales made to non-Indians. This is true, but trivial. The issue is whether Indians are subject to the state tax on motor vehicle fuel. The non-Indian licensed distributor, required under Idaho law to collect and remit the tax, received full credit for every penny of tax the Tribe sent the state for fuel sold to non-Indians. The only tax money at issue in this case is for fuel sold to Indians on the Reservation.

Likewise, the fact respondents had a tribal business license has nothing to do with whether Congress authorized states to collect their motor vehicle fuel taxes on sales made to Indians on their reservations.

COMMENT ON RESPONDENTS' REASONS FOR DENYING THE WRIT

Respondents observe the issue the Commission presents is important, but argue it should be left for Congress to decide. The Commission's point is that Congress did decide the issue in 1936 when it enacted the Hayden-Cartwright Act. (4 U.S.C. § 104.) It is, of course, left ultimately to this Court to interpret Congressional enactments. That both petitioner and respondents agree the issue is important is good reason for the Court to grant the Commission's petition.

Respondents correctly identify the two chief lines of argument the Commission relies upon for the proposition that the Hayden-Cartwright Act provides Congressional consent for states to impose their nondiscriminatory motor fuel taxes on fuel sold to Indians and tribes on reservations. First, the term "licensed trader" means licensed Indian trader. This is no new assertion. In 1940, the Solicitor of the Department of the Interior expressed the view that the phrase is "particularly suggestive of Indian reservations." 57 Interior Dec. 129 at 139 (1940). Second, Congress endorsed the 1940 administrative opinion when it twice subsequently reenacted Hayden-Cartwright without change. These two lines of argument provide ample reason for holding states can impose their motor fuel taxes on reservation sales to Indians. This is true despite the special rules of construction applicable to state taxation of Indians on reservations. It is true despite a mistake in the meaning of the term "licensed trader" made by a federal district court judge in Kentucky sixty years ago (*Falls City Brewing Company v. Reeves*, 40

F. Supp. 35 (W.D. Ky. 1941), despite respondents' misplaced reliance on the Buck Act (Pub. L. 819, 54 Stat. 1059, [1940]), a sales tax measure, and despite use of the term "reservation" in other sections of the Hayden-Cartwright Act. This brief, of course, is not the place to go into the arguments.

CONCLUSION

Both petitioner and respondents agree this case presents an important issue. Petitioner respectfully requests the petition be granted.

Respectfully submitted,

ALAN G. LANCE
Attorney General

CARL E. OLSSON
Deputy Attorney General

THEODORE V. SPANGLER, JR.
Deputy Attorney General